



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

Address: COMMISSIONER FOR PATENTS

P.O. Box 1450

Alexandria, Virginia 22313-1450

www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/551,828	09/30/2005	Glen Crofskey	19134	3992
23389 7590 05/20/2010 SCULLY SCOTT MURPHY & PRESSER, PC 400 GARDEN CITY PLAZA SUITE 300 GARDEN CITY, NY 11530				
EXAMINER				
GWARTNEY, ELIZABETH A				
ART UNIT		PAPER NUMBER		
1781				
MAIL DATE		DELIVERY MODE		
05/20/2010		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

**ATTACHMENT TO ADVISORY ACTION**

The Amendment filed May 4, 2010 has been entered. Claim 2 has been cancelled. Claims 1 and 3-11 are pending.

The rejection of claims 1-7 and 10-11 under 35 U.S.C. §103(a) in view of Cerda et al. (US 5,514,666) and of claims 8-9 under 35 U.S.C. §103(a) in view of Cerda et al. and May ("Pectins") is maintained.

"Applicants disagree with the Examiner's assertion that the lower pectin amount of the instant claims is non-critical and adjustable variable that could be accomplished by one skilled in the art by routine experimentation." Applicants submit that the lower amount of pectin in the claimed protein powder is advantageous because less is required resulting in significant cost savings and a protein-containing liquid with a significantly lowered viscosity.

In this case, since the instant specification is silent with respect to unexpected results or the criticality to the upper range of the pectin composition, the specific pectin content of the protein powder composition is not considered to confer patentability to the claims. One of ordinary skill in the art would expect that using a lower amount of pectin would result in a cost savings and lower viscosity.

Applicants assert that they "believe that the reason Cerda et al. teach such a higher amount of pectin is because, in contrast to the instant claims, Cerda et al. does not teach the feature of the instant claims that the pectin is adsorbed to the protein base. . . Without the adsorption of pectin, Cerda et al. are attempting to impart stability of the protein powder by compensating with a much larger amount of pectin." Applicants explain that the instant application teaches that a special process of homogenization is employed to cause the pectin to

be adsorbed to the protein base. In contrast, Cerda et al. teach simple mixing, i.e. with a stirrer. Applicants assert that the application as filed presents the results of comparative experiments that clearly demonstrate the inability of mixing (as opposed to homogenization) to effect stabilization of the protein powder. Applicants argue that “the lack of stabilization resulting from mixing is a result of the pectin not being adsorbed to the protein by this process.”

Applicants have not shown, with evidence, that pectin is not adsorbed to the protein base of Cerda et al. Here, applicants compare a test protein powder (test) made by (a) homogenizing a mixture comprising pectin, protein and water; and (b) spray drying to form a protein powder base to a reference protein powder made by (a) homogenizing a mixture comprising protein and water; (b) spray drying to form a protein powder base; and (c) dry mixing with pectin. Applicants submit that the test sample was stable while the reference sample showed phase separation and sedimentation.

However, applicants have not shown that comparison samples in said examples fairly represent the closest prior art. Cerda et al. disclose a protein powder made by (a) mixing protein, pectin and water; and (b) drying the mixture. Cerda et al. does **not** disclose a protein powder made by (a) homogenizing a protein and water mixture; (b) drying the mixture to form a powder; and (c) dry mixing the powder with pectin.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ELIZABETH GWARTNEY whose telephone number is (571)270-3874. The examiner can normally be reached on M-F.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 1781

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/E. G./

Examiner, Art Unit 1781

/Keith D. Hendricks/

Supervisory Patent Examiner, Art Unit 1781